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justified by Chief Justice Peters in his long and learned opinion. What makes this case especially interesting is that the gift was of personalty, so that the decision is, on its face, directly contrary to that in *Re McGraw's Estate*, 111 N. Y. 66, the most important previous case on bequests of personalty. The court does not directly disapprove that case, taking it to rest on a strict construction of certain New York statutes, but its reasoning all goes in the contrary direction.

The want of clearness in all the cases on this subject results, perhaps, from a failure to perceive that in establishing its rule on this subject any court can, with some justification in principle, draw the line against gifts to corporations, in excess of the amount they are authorized to hold, at any one of three places, or not at all. It can draw it so as to exclude such gifts in all cases; or between gifts *inter vivos* and gift by will; or between devises of land and bequests of personalty. Or it can hold all such gifts valid, always leaving to the State, of course, its right to punish the corporation by direct proceedings for its violation of its charter. Consistently to treat all gifts in excess of the limit as void would probably seem too severe a policy to any court. The possibility of a distinction between gifts *inter vivos* and testamentary gifts was pointed out in 9 HARVARD LAW REVIEW, 350. Still stronger technical grounds would seem to exist for making a distinction between devises and bequests. No practical reason, on the other hand, can easily be found for drawing the line at any particular place. In this branch, at least, of the subject of *ultra vires* transactions by corporations, the doctrine that only the State can take advantage of the lack of authority in the corporation seems very attractive.

A MARITIME CONTRACT OF CARRIAGE. — It was formerly the opinion of several American jurists, including Mr. Justice Betts, an acknowledged authority on maritime law, that when a contract of carriage by sea has been entered into, not only the owner, but the vessel herself, is at once bound, without more, to the performance of the contract; or, in other words, that a right *in rem* immediately arises. A *dictum*, however, of the Supreme Court of the United States in *The Freeman v. Buckingham*, 18 How. 182, seems to have changed the trend of decisions, and it is unquestionably the prevailing doctrine at the present day that a court of admiralty has no jurisdiction *in rem* for the breach of a purely executory contract.

The recent case of *The Eugene*, 83 Fed. 222, is in accordance with this modern doctrine. Usually the question has arisen in connection with a contract of affreightment, and this late decision is interesting as showing that the principle is equally applicable to a contract of passenger carriage. In this case it appears that the owner of the steamer "Eugene" contracted to carry the libellants, with their baggage, on board that particular vessel, from St. Michaels to Dawson City. The libellants alleged a breach of this contract on the part of the vessel in that she never went to St. Michaels to receive them. The court held that a suit *in rem* was not maintainable for a breach of this executory contract, inasmuch as the lien, upon which the right to proceed *in rem* depends, does not attach until the passenger has placed himself within the care and under the control of the ship's master.

It would seem to be the correct view that no lien upon the vessel arises merely from the fact that her owner has entered into a contract of car-

riage. The basis of a maritime lien is to be found in marine service by or to the vessel herself, often irrespective of the contracts of her owner. Where, therefore, the parties have made a contract of carriage, there remains the further question as to what must be done in performance of the contract in order to entitle the passenger or the shipper to a lien upon the vessel herself. Many of the cases, including *The Eugene*, seem to proceed upon the theory that the obligation between the vessel and the cargo or passenger being mutual and reciprocal the lien attaches as soon as the cargo or the passenger is on board the ship, or at least under the control of the master. It is conceived, however, that in strictness no lien upon the vessel comes into existence until she sets sail. Before the voyage actually begins, the passenger or shipper has adequate remedy against the carrier in the courts of common law, or by a proceeding *in personam* in the courts of admiralty; and until that time the vessel herself can hardly be considered at fault. But as soon as the vessel leaves her dock, she enters upon marine service, and from that moment the vessel and the cargo or passenger may truly be regarded as mutually and reciprocally bound. This view is certainly supported by the analogous cases which hold that the carrier has no lien upon the goods until the ship starts upon her voyage.

THE MAKER'S DEFENCE OF "NEVER CONTRACTED." — A late English case, decided by Lord Chief Justice Russell, clearly illustrates an important distinction in the law of negotiable paper. In this case, *Lewis v. Clay* (reported in 42 Solicitors' Journal, 151), which was an action by the payee of a note against one of two co-makers, the defendant pleaded that he never made the note. It seems that the defendant signed the instrument without reading it, relying upon the fraudulent statement of his friend, the other co-maker, that he was simply witnessing a deed. The jury found that the defendant had not been negligent, and that the plaintiff took the note from the fraudulent co-maker for value and without notice. It was held that the defendant, having used due care, was not estopped from setting up the true facts; and that, according to these facts, the defendant had never made the note in question.

Unquestionably the true nature of the obligation assumed by the maker of a note is that of contract to pay the payee or the holder in due course. One of the essential characteristics of contract, however, is mental assent, and in such a case as *Lewis v. Clay*, *supra*, where the defendant thought he was signing an entirely different instrument, it is certainly difficult to find this feature. As tersely put by Mr. Justice Byles, in *Foster v. Mackinnon*, L. R. 4 C. P. 704, a similar case, "he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended." Though, in Lord Russell's view, the plaintiff in *Lewis v. Clay*, being the named payee, was not a holder in due course, it has been the law ever since the decision in *Foster v. Mackinnon* that, in the absence of negligence, the plea that there has not only been fraud, but that the defendant has never entered into the contract, is equally available against such a holder. Where, however, the defendant has acted without due care, as by not reading the paper when he should have read it, it is properly held that he is estopped as against a purchaser for value without notice from denying the execution of the instrument; and, according to *Lewis v. Clay*, the